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OCTOBER TERM, 1900.

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THE BOARD OF LIQUIDATION OF THE CITY DEBT, PLAINTIFF IN ERROR,

vs.

STATE *ex Rel.* MISS L. B. WILDER AND OTHERS, DEFENDANTS IN ERROR.

THE DRAINAGE COMMISSION OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE SAME.

SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFFS IN ERROR.

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WALKER B. SPENCER,
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Plaintiffs in Error.

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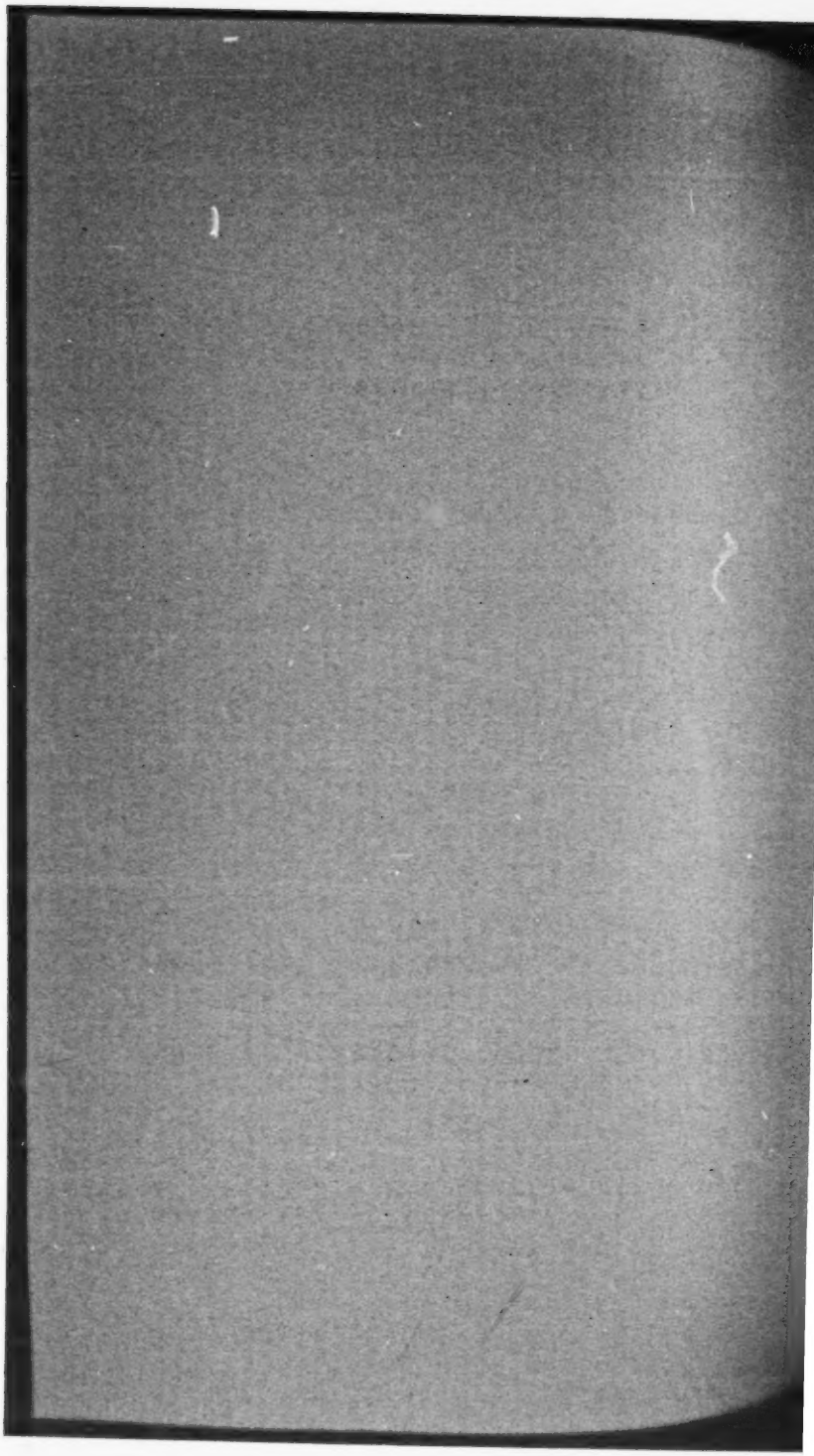

IN THE

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SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFFS IN ERROR.

As stated in the oral argument, the defendants in error urge two grounds, why the intervention of the Drainage Commission should be dismissed, as not showing any legal

interest on its part in the subject matter of the suit. These grounds are as follows :

1st. That the acts 114 of 1896, and 63 of 1898, are unconstitutional and void, as being in conflict with act 110 of 1890, adopted as an amendment of the Constitution of 1879, in 1892, in so far as said acts attempt to apply and dedicate, the "Permanent Public Improvement Fund" created by section 8 of the act 110 of 1890, to drainage purposes, and in so far as they attempt to vest the Drainage Commission of New Orleans, with the control and disposition of said fund. This contention is based upon the theory, that as section 10 of act 110 of 1890, made part of the constitution in 1892, provides that the fund shall be used exclusively for permanent public improvements, and that the city council shall have the right to pass ordinances, payable out of this fund, it was incompetent for the legislature to take the control of that fund out of the hands of the city council, and vest it in the Drainage Commission; therefore, as said acts were unconstitutional, the Drainage Commission had no right to the fund and no real interest in this suit.

2d. That as act 110 of 1890, contemplated an issue of $10,000,000 of Constitutional Bonds, even admitting the validity of said acts of 1896 and 1898, yet as the Drainage Commission was interested only in the surplus of the proceeds of the 1 per cent. tax, after payment of the annual interest charge on an issue of bonds authorized by the act of 1890 and other fixed charges, it had no cause of complaint until and unless, the proposed issue caused that limit to be exceeded.

As to the first ground of objection urged by the defendants in error, we concede that if the legislature had no power to apply the fund in question to drainage purposes, and to put the disposition and control of said fund in the hands of the Drainage Commission, as attempted by acts 114 of 1896 and 63 of 1898, then the Drainage Commission had no interest to sustain its right of intervention, and its petition of intervention should be dismissed for want of interest.

We desire first to call the court's attention to the fact, that nowhere in the pleadings, did the defendants in error specially set up the unconstitutionality of the acts in question. (See answer of defendants in error to intervention of Drainage Commission, Record, page 42.) And under the doctrine of State *vs.* St. Romes, 26 La. Ann. Reps., 753, the court should not declare an act unconstitutional, unless the distinct issue is raised and the reasons placed upon record in the pleadings. We are clear that the mere denial of interest in the Drainage Commission in the subject matter of the suit, is not sufficient to raise this question. The supreme court of Louisiana evidently took this view, as it did not directly consider the point; but that court was evidently of the opinion, that this contention of the defendants in error was not well founded, for it will be seen that by its final decree (Rec., page 125) the right and interest of the Commission to intervene, was expressly recognized and declared. This result could only have been reached by the court upon the assumption that said acts were in this respect valid.

We feel assured that this court will follow the decision of the State court on this point, in view of the fact that the right

of intervention in this suit is a matter to be determined exclusively by Louisiana statutes and practice.

Cornell *vs.* Fiske, 136 U. S., 152, 174.

In re Duncan, 139 U. S., 449.

But, be this as it may, we submit that an independent consideration of this question, will lead this court to the conclusion that the application, dedication, and control of said fund, as attempted by said acts of 1896 and 1898, were a valid exercise of legislative authority.

It may first be noted, that at the time the act 110 of 1890 was adopted, the city of New Orleans was under the domain of its charter (act 20 of 1882), which vested all legislative functions in a city council of thirty members, and more particularly the control and disposition of all public funds accruing to the city for its general municipal purposes. It would therefore be expected, when this fund was dedicated to permanent public improvements, that the proper body then existing, to whom its control and administration should be given would be the city council.

The dedication was to the purpose, and not to the instrumentality by which the purpose was to be accomplished. The object to be attained was the use of the surplus for public improvement, and not its permanent control and administration by the city council.

An examination of section 10 of act 110 of 1890 shows that the "Permanent Public Improvement Fund" was dedicated to the construction of permanent public improvements. This dedication was further sanctified by incorporation into the constitution in 1892, and by the declaration that all the substantial provisions of said act

were to constitute a contract between the city and its bondholders. The question now is, whether the mere mention of the agency then authorized by law to administer the public funds of the city as the one by which this fund was to be administered, constituted the city council, as then organized and existing, a permanent constitutional body, whose grasp on this fund could not be released save only by a constitutional enactment. To hold that such was the case would be to deprive the legislature of its generally recognized control of municipal corporations created by it, whenever incidentally the existing form of government of any city might be mentioned in the constitution. The power of the legislature over municipal corporations created by it, is so universally recognized that the court would not be justified in assuming such an intention on the part of the framers of the constitution, unless such intention was manifested in terms so plain and unmistakable, that no other conclusion could be reached. Far from such a construction of this article being possible under the language used, when we consider article 254 of the constitution of 1879, which was then in existence, and which must be read with the law here considered, expressly authorized the legislature to abolish the charter of the city of New Orleans and remit its inhabitants to any form of government that it might see fit, such a construction would be absurd. As a matter of fact, the legislature, in 1882, did abolish the then existing charter of that city granted in 1870, and again, in 1896, abolished the charter of 1882 and substituted in place of the city council of thirty members, which was in existence in 1890, when said act was passed, a council of seventeen members, with radi-

cally different powers and duties; so that today the body referred to in said act of 1890 is no longer in existence.

In support of our position, that it was competent for the legislature to make the application and dedication of this fund as attempted by said acts of 1896 and 1898, and to vest the Drainage Commission with its control and administration, we refer the court to the following authorities:

Mayor, etc., *vs.* State *ex rel.* Board, 15 Maryland, 376, 428, 429.

Boyd *vs.* Chambers, 78 Ky., 140.

City of Paterson *vs.* Society, etc., 4 Zabriskie (24 N. J. L.), 385.

People *vs.* Hurlbut, 24 Mich., 44, 73.

Rutgers *vs.* Mayor, 42 N. J. L., 51.

People *vs.* Draper, 15 N. Y., 561.

State *vs.* Morrell, 2 Wend. (N. Y.), 563.

People *vs.* Albertson, 55 N. Y., 50.

The purpose for which the fund can be used is everything; the instrumentality through which it is to reach the purpose is nothing. The former is essential; the latter a mere convenience.

It has been held in Kentucky that a provision of the State constitution as to courts and the election of judges was never intended to take from the legislature the power to enlarge the boundaries of towns in existence at the time of the adoption of the constitution, or to alter or abolish the courts therein, when the law-making power should deem it to the benefit of the inhabitants.

Beach on Public Corporations, section 718.

In Boyd *vs.* Chambers, 78 Ky., 140, the right to office of a city judge, elected in accordance with the terms of a new charter of a city, reincorporated, was sustained over the claims of one elected, when the provisions of the constitution governed the election of city judges.

See also Rutgers *vs.* Mayor, etc., of New Brunswick, 42 N. J. L., 51.

The fact that the constitution of a State mentions and recognizes a particular municipal corporation does not make the charter of a corporation a constitutional charter, so as to place it beyond the reach of the legislative power.

Beach on Public Corporations, section 719.

Mayor, etc., of Baltimore *vs.* State, 15 Md., 376.

The question, at most, is whether or not the legislature had authority to take away from the council whatever power was given to it by section 10, conceding the latter to be part of the constitutional amendment of 1892.

This power of the council pertains to the city, not in its proprietary or private, but in its governmental or legislative, or public character, the nature of which is not changed by the mention which is made of it in the constitutional amendment of 1892; over the political powers of a municipal corporation, the authority of the legislature is, in the nature of things, supreme and without limitation, unless that be found in some peculiar provision of the constitution.

Dillon on Municipal Corporations, section 66.

Even where the rights of private parties under a contract to fund the floating indebtedness of a municipality are fully

protected by the Federal and State constitutions, a change in the method of levying taxes, not affecting or impairing the security of the creditors, is deemed invalid.

Dillon on Municipal Corporations, section 69.

The act of the legislature, establishing a board of public works, cannot be held invalid, on the ground that it divests the old board or city corporation, or common council, of the title to property and transfers it to, or vests it in, such a board of public works.

People *vs.* Hurlbut, 24 Mich., 44–73. Particularly the opinion of Christiancy, judge.

The fact that the constitution mentions and recognizes a municipal corporation does not make the charter of the city a constitutional charter, so as to place it beyond the legislative power.

Mayor, etc., of Baltimore *vs.* State, 15 Md., 376 (74th Am. Dec., 572).

People *vs.* Draper, 15 N. Y., 561.

State *vs.* Morrell, 21 Wend., N. Y., 563.

People *vs.* Albertson, 55 N. Y., 50.

Paterson *vs.* Society, etc., 24 N. J. L., 385.

People *vs.* Hurlbut, 24 Mich., 44 (19th Am. Rep., 103).

The political powers conferred upon a corporation for the local government of a place are not vested rights as against the State, and where there are no constitutional restrictions upon the action of the legislature, it has absolute control to create, change, modify, or destroy them at pleasure.

American and English Encyclopedia, vol. 15, p. 976.

Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred on them are not vested rights as against the State, but, being wholly political, exist only during the will of the legislature. Such powers may at any time be repealed or abrogated by the legislature, either by a law operating on the whole State, or by a special act altering the powers of corporations.

Sloan *vs.* State, 8 Blackf. (Indiana), 51.

The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision, which prohibits the obligation of contracts being violated. Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion.

Cooley's Constitutional Limitations, pages 228, 229.

In conclusion, if it was competent for the legislature to abolish the then city council absolutely, *a fortiori* was it competent for it to deprive it of the control of this particular fund, and vest its administration in another public body.

As to the second objection, that the surplus dedicated to the purposes of the Drainage Commission meant that portion of the proceeds of the 1 per cent. tax, left over after providing for the annual charges on a basis of $10,000,000 of bonds, and that unless and until the issue exceeded that sum, the Drainage Commission had no cause to complain, we desire to first direct the Court's attention to the fact, that the meaning of these words was to be found exclusively in the acts of 1890, 1896, and 1898 and the amendment to the constitution of 1892, all of which were local statutes, and then to the very full discussion of this question in the opinion of the supreme court of Louisiana.

Concerning this question that court said (Rec., page 113):

"We do not take the same view that relators do as to what was meant by and intended to be conveyed by the 'surplus' referred to by act 110 of 1890, act No. 114 of 1896, and the constitutional amendment of 1892. We think the lawmakers intended that any portion of the one per cent. tax provided for in act 110, not needed for the payment or retirement of the particular bonds or claims therein specially provided for as to payment or retirement, should constitute the surplus of the tax; that it was not contemplated when these laws were passed, or the amendment of 1892 adopted, that in order to exhaust any portion of the ten millions of dollars originally expected to be needed to pay the existing bonds and the existing claims therein specially enumerated which might not be necessary for that purpose, new classes of claims should or would be thrown under the provisions of the original funding law.

"We think the 'surplus,' was intended to connect at once, and follow immediately behind, as to its appropriation the amount beyond that, actually needed to carry out the plan as originally mapped out and planned. The surplus was provisionally ascertained each year, in a manner particularly specified to be readjusted; the next in a manner also particularly specified. All the surroundings and circumstances connected with the legislation, negative the idea that the surplus mentioned, was to be only any surplus over ten millions of dollars which might result from the collection of the one per cent. tax" (Rec., page 113).

* * * * * * *

But, independent of this, we confidently submit that there is no just foundation for the contention of the defendants in error.

By section 8 of the act of 1890, out of the proceeds of the 1 per cent. tax there were to be paid:

1. The annual interest on all outstanding constitutional bonds that had been issued by the Board of Liquidation for the specific purposes mentioned in the act.

2. The annual interest on all other outstanding unmatured bonds not retired under the provisions of the act.

3. The annual premiums and allotments of the premium bonds.

4. The deficiency, if any, in the interest of former years.

5. The annual allotment for a sinking fund, after the year

1925, to retire each year the amount of bonds fixed by section 9.

6. The expenses of the board.

After all these charges had been paid or provided for, the amount remaining constituted and was designated as, "the surplus of the 1 per cent. tax." So that from year to year this surplus was ascertained and fixed. It accrued and was determined each year from the very inception of the plan. It was more or less, according to the amounts required for the annual charges. It will be greatly diminished after the year 1925 by the demands of the sinking fund; but, such as it was, it was fixed each year (and as so fixed was dedicated to the purposes mentioned in section 10) upon the basis of the amount of the constitutional bonds then actually outstanding, and regardless of the fact that in future years the amount of the outstanding ~~construction~~ constitutional bonds would from time to time be increased.

Such was the status under the operations of the act of 1890, when the drainage act of 1896 was passed; and the conclusion is inevitable that when the legislature dealt with that surplus by the act of 1896, it meant and intended, that the surplus as fixed and determined year by year by the method then in vogue, was the fund which it dedicated to the purposes of the Drainage Commission. If a contrary intention existed, would it not have been manifested clearly, by the use of language showing that the method theretofore in vogue, in determining the amount of the surplus, was to be disregarded, and a method based upon a consideration of the full issue of $10,000,000 of bonds adopted? The lan-

guage of section 3 of act 114 of 1896, dedicating this surplus, shows clearly to our minds that the surplus dedicated was to be determined upon the basis of the conditions actually existing each year, in accordance with the terms of the act of 1890.

Furthermore, when the act of 1896 was adopted, the idea of charging the funds accruing from the 1 per cent. tax, with the payment of the debts of the defendants in error, had occurred to no one and was not contemplated. Can it be supposed, then, that the legislature intended that only a portion of the permanent public improvement fund should be dedicated to drainage, and that the balance of that fund was to continue to be used and expended by the city council? In other words, that for drainage purposes the calculation of the surplus was to be made on an issue of $10,000,000, and for other permanent improvements on the issue actually outstanding? Manifestly it intended that the entire fund, as ascertained and fixed each year under the terms of the act of 1890, was to be devoted to drainage. The legislature evidently recognized that the entire fund was necessary for this great work, and this fact is supported by the testimony in the record.

We submit, therefore, that the opinion of the supreme court of Louisiana was correct in this respect.

Finally, we submit that, as the entire permanent public improvement fund as defined and fixed each year, in accordance with the provisions of act 110 of 1890, was dedicated and consecrated to the obligations of the Drainage Commission, and as that body, long before the adoption of the constitution of 1898, had contracted debts upon the faith of that

dedication, and as, moreover, that entire fund is necessary to pay same, it was not competent for the State by legislative or constitutional enactment to take away any part of same and give it to relator.

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